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## In The Land of Kelo: Still No Meaningful Protection for Property Owners

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<sup>70</sup> Dallas A. Browne, *Mexican-U.S. Border Relations: Opportunities and Obstacles*. HISTORY BEHIND THE HEADLINES: THE ORIGINS OF CONFLICTS WORLDWIDE. Vol. 2, 172. ( Sonia G. Benson, Nancy Matuszak, and Meghan Appel O'Meara, eds., Gale, 2001)

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Stephen Hoadley, *Australia's Illegal Migration: An Australian Dilemma or a Worldwide Challenge*, HISTORY BEHIND THE HEADLINES: THE ORIGINS OF CONFLICTS WORLDWIDE, Vol. 6, 31 (Sonia G. Benson Nancy Matuszak, and Megan Appel O'Meara, eds, Gale, 2003)

<sup>74</sup> H.R. 4088, 110<sup>th</sup> Cong. (2007); S. 2366, 110<sup>th</sup> Cong. (2007)

<sup>75</sup> *Id.*

<sup>76</sup> <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN02368>:

<sup>77</sup> <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR04088>:

<sup>78</sup> H.R. 4088, 110<sup>th</sup> Cong. (2007) at §5202

<sup>79</sup> *Id.* at §102

<sup>80</sup> *Id.* at §103

<sup>81</sup> *Id.* at §201

<sup>82</sup> *Id.* at §203

<sup>83</sup> <http://www.cbo.gov/ftpdocs/91xx/doc9100/hr4088ltr.pdf>

<sup>84</sup> *Id.*

IN THE LAND OF *KELO*:  
STILL NO MEANINGFUL PROTECTION  
FOR PROPERTY OWNERS

by  
Judy Gedge\*

ABSTRACT

This article analyzes Connecticut's legislative response to the Supreme Court's decision in *Kelo v. City of New London*. Following a brief summary of the *Kelo* case, the article describes the municipal economic development statutes in effect in 2000 when the New London project was approved and how these statutes were changed in response to the popular backlash against *Kelo*. Under newly adopted Conn. Gen. Stat. 8-193(b)(1), eminent domain may not be used to acquire property for economic development if its primary purpose is to increase local tax revenue. The New London development plan in *Kelo* is put to the new statutory test to see if it would protect the affected property owners. The clear conclusion is that Connecticut's statutory reform provides no meaningful protection for property owners against the use of eminent domain for private commercial projects.

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## INTRODUCTION

In *Kelo v. City of New London*,<sup>1</sup> the U.S. Supreme Court held that private economic development is a permitted public use under the Fifth Amendment to the U.S. Constitution. *Kelo* arose from the exercise of eminent domain under an economic development plan adopted by the City of New London, Connecticut in November 2000. The City condemned the property of Susette Kelo and eight other property owners pursuant to its plan for the Fort Trumbull section of the City in which property would be transferred to a private developer to build a project consisting of a hotel and conference center, private residences and office buildings. The purpose was to create jobs and increase tax revenues for the City. The use of eminent domain for such private economic development was explicitly authorized under Connecticut law.<sup>2</sup>

The Supreme Court's decision in *Kelo* created a popular backlash against the use of eminent domain for private economic development. In response to this national outcry, many states have enacted reform measures to limit the power of eminent domain.

This article provides a brief background of the *Kelo* case including a summary of the Supreme Court decision. Its primary focus, however, is an analysis of the reform enacted by the State of Connecticut in response to *Kelo*. To determine whether the statutory reform provides any meaningful protection to property owners, the article also asks the fundamental question: If the identical New London development plan were adopted today, would the revised Connecticut law protect property owners from a compulsory purchase of their homes?

## BACKGROUND

### A. Property Rights

The legal issue raised in *Kelo* reflects a clash of two bedrock principles - the government's authority to exercise the power of eminent domain and the individual's right to use and enjoy his private property. The right of private property is among the most revered in the common law tradition. In fact, the protection of property rights against government interference can be traced as far back as the Magna Carta in the thirteenth century.<sup>3</sup> The provisions in the U.S. Constitution that protect property rights, including the Fifth Amendment, reflect the paramount value placed by the Founding Fathers on the right to acquire and own property.<sup>4</sup>

In 1795, the Supreme Court emphasized the importance of property rights as follows: "the right of acquiring and possessing property and having it protected is one of the natural, inherent and inalienable rights of man . . . [T]he preservation of property then is a primary object of the social compact."<sup>5</sup>

For more than two hundred years, the Supreme Court has consistently held that it is unlawful for the government to take property from *A* and give it to *B*. In the oft-cited case *Calder v. Bull*, Justice Chase wrote:

An Act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. . . . A few instances will suffice to explain what I mean . . . [A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with such powers;

and, therefore, it cannot be presumed that they have done it.<sup>6</sup>

### B. Eminent Domain

While the sanctity of property rights is a long-standing tradition dating back to early English law, the state's power of eminent domain also has a long history. It derives from the sovereign's inherent power to acquire private property and purportedly dates back to Roman times.<sup>7</sup>

The Fifth Amendment limits the government's power of eminent domain by requiring that a taking be for a public use and that just compensation be paid to the owner.<sup>8</sup> Similar protections are also embodied in state laws.<sup>9</sup> As Justice O'Connor stated in her dissenting opinion in *Kelo*: "The public use requirement . . . circumscribes[s] the very scope of the eminent domain power: Government may compel an individual to forfeit her property for the *public's* use, but not for the benefit of another private person. This requirement promotes fairness as well as security."<sup>10</sup>

What then constitutes public use? The interpretation of public use has been greatly expanded over the last fifty years.<sup>11</sup> This issue became the key battleground between the individual's right to possess and use his property and the state's competing interest in taking it for the public use.

It is well-established that eminent domain can properly be used to take property which will be owned by the government and open to the public (such as for a school or a highway).<sup>12</sup> Under what circumstances, however, is the exercise of eminent domain constitutionally permitted when the property will be transferred to a private party? There is no general consensus on this issue.<sup>13</sup> It is the constitutionality of this expanded use of eminent domain which is at the heart of the *Kelo* case where property was taken for the purpose of transferring it to a private party to build a private commercial development.

### C. New London and Susette Kelo

That the City of New London was in economic decline was evidenced by its designation by the State as a distressed municipality in 1990. In particular, the City had suffered from the closing of the Naval Undersea Warfare Center in 1996 which resulted in the loss of over 1,500 jobs. In an effort to revive the city, the New London Development Corporation (NLDC) was reactivated in 1998 and authorized to act as the City's development agent. In early 1998, Pfizer Inc., the pharmaceutical company, announced that it would build a \$300 million research facility on the New London Mill site immediately adjacent to the City's Fort Trumbull waterfront district. The project was projected to provide nearly 2,000 jobs.<sup>14</sup>

Following Pfizer's announcement, the NLDC prepared an integrated municipal economic development plan for the Fort Trumbull area pursuant to Connecticut General Statutes (CGS) section 8-189. The development plan encompassed approximately 90 acres consisting of 115 privately owned properties and the 32 acres of land formerly occupied by the naval facility. The plan included a waterfront conference hotel, a 90,000 square foot research and development facility, new houses, office, retail space, and other commercial uses.<sup>15</sup>

The plan's purpose was to complement the new Pfizer project, create jobs, increase tax revenues, encourage public access to the city's waterfront and eventually build momentum for the revitalization of the rest of the City including its downtown area. The plan was also designed to make the City generally more attractive and provide leisure and recreational opportunities on the waterfront and in the park.<sup>16</sup>

The plan required the acquisition of the 90-acre project area by the City and its subsequent transfer to a private party who would be responsible for developing the property.<sup>17</sup> The plan was approved by the New London City Council in January 2000 and the NLDC was authorized to purchase the property or acquire it using eminent domain. The NLDC was able to negotiate the purchase of most of the property in the project area but it was unable to purchase fifteen parcels. Nine owners refused to sell their properties to the City. The NLDC exercised its power of eminent domain on behalf of New London to condemn these properties.<sup>18</sup>

These fifteen properties in the Fort Trumbull neighborhood were not blighted. There is no claim that they were in poor condition. They were condemned solely because they were located within the area of the development plan adopted by New London.<sup>19</sup>

Susette Kelo and the eight other affected property owners filed suit against the City of New London challenging the condemnation of their properties. They argued that the takings did not constitute a public use and were therefore invalid under the Constitution of the State of Connecticut<sup>20</sup> and the U.S. Constitution.<sup>21</sup> New London argued that the taking of non-blighted property to transfer it to a private developer for the purpose of private economic development which was intended to increase tax revenues and create jobs was a public use and, therefore, a constitutionally permitted taking.

The case was appealed to the Connecticut Supreme Court which rejected the homeowners' arguments. The court held that an economic development plan that the City had rationally determined would promote significant municipal economic development constituted a valid public use, thus permitting the exercise of eminent domain under both the federal and state

constitutions.<sup>22</sup> The homeowners appealed to the U.S. Supreme Court.

### THE SUPREME COURT DECISION

In addressing the issues raised in *Kelo*, the Supreme Court pointed out two polar propositions at the heart of the case.<sup>23</sup> First, the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B* even though compensation is paid to *A*. However, the State may transfer property from one private party to another if the purpose is public use such as condemnation for a railroad with common-carrier duties.<sup>24</sup> The Court traced the history of its interpretation of public use concluding that, having rejected a literal requirement that condemned property be put into use for the general public, it had adopted instead a broader interpretation of public use as public purpose.<sup>25</sup>

The issue in *Kelo* was whether the New London plan served a public purpose. In making this determination, the Court afforded substantial deference to the legislature's determination of what public needs justify the use of the takings power.<sup>26</sup>

The *Kelo* decision relied heavily on *Berman v. Parker*,<sup>27</sup> a case which affirmed the exercise of eminent domain to transform a blighted area of Washington D.C. into a well-balanced community through redevelopment.<sup>28</sup> In addition, the Court relied on *Hawaii Housing Authority v. Midkiff*<sup>29</sup> which upheld the compulsory transfer of fee title from property owners to their tenants in order to reduce the concentration of land ownership in Hawaii.<sup>30</sup> Relying on the reasoning of both these cases, the Court stated: "It would be incongruous to hold that the City's interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than any of those other interests. Clearly,



there is no basis for exempting economic development from our traditionally broad understanding of public purpose."<sup>31</sup>

In upholding the constitutionality of the takings in *Kelo*, the Court concluded that the comprehensive development that New London believed would provide new jobs, increase tax revenues and provide other appreciable benefits to the community satisfied the public use requirement of the Fifth Amendment.<sup>32</sup>

In its majority opinion, the Supreme Court noted that property owners can turn to their own state governments to obtain more stringent restrictions on the exercise of the taking power.<sup>33</sup> In direct response to *Kelo*, many states did enact legislation to limit the power of eminent domain.

#### CONNECTICUT'S LEGISLATIVE REFORM

By January 1, 2008, thirty-nine states had enacted legislation or passed ballot measures in response to *Kelo*.<sup>34</sup> Many polls taken following the *Kelo* ruling reflect an overwhelming negative response to the use of eminent domain for private economic development.<sup>35</sup> In Connecticut, a 2005 Quinnipiac University poll showed that 88% of the poll participants disagreed with the use of eminent domain for private economic development.<sup>36</sup> The Connecticut legislature adopted its own post-*Kelo* reform measures in 2007.<sup>37</sup>

##### *A. Reform to Connecticut Municipal Economic Development Statutes*

The policy underlying municipal economic development in Connecticut is to promote the growth of industry and business by helping cities acquire and improve property. Cities are authorized to acquire property for industrial and business

purposes and, under certain circumstances, to obtain state funds for development projects all of which are identified as public uses and purposes.<sup>38</sup>

The statutes governing municipal economic development in effect in 2000 provided a detailed framework for a plan's contents,<sup>39</sup> a public hearing process,<sup>40</sup> and a plan's adoption by the city council.<sup>41</sup> Upon approval of a plan, the development agency is authorized to acquire the real estate in the project area but, if eminent domain will be used to acquire property, the agency must obtain the prior approval of the city council.<sup>42</sup> The agency is specifically authorized to transfer property in the project area to private parties provided such transfer is at fair market value.<sup>43</sup> This statutory scheme was in effect in 2000 and remains in effect today subject to the recent reform measures discussed below.

In 2007, the Connecticut legislature enacted revisions to the statutes governing municipal economic development projects (such as the one in New London) as well as to the statutes governing municipal blight eradication projects.

##### *1. Adoption of Primary Purpose Test.*

The recently adopted reform measures impose a limitation on the government's power to condemn non-blighted property for economic development. Under newly-adopted CGS section 8-193(b)(1), eminent domain may not be used to acquire property for an economic development project if its primary purpose is to increase local tax revenue.<sup>44</sup>

In addition, under new statutory provisions, a development plan must contain:

- A description of the public benefits of the project including the estimated property tax benefits, its intended role in increasing or sustaining market value of land in the municipality and in maintaining or enhancing the competitiveness of the municipality;<sup>45</sup> and
- A finding that the public benefits of the plan outweigh any private benefits, that the use of eminent domain is reasonably necessary, and that the plan is not for the primary purpose of increasing tax revenues.<sup>46</sup>

Cities are authorized under this statutory framework to adopt and implement a plan to develop non-blighted property. This includes the right to acquire such property by eminent domain and transfer it to private persons for development in accordance with the approved plan. The only new substantive limitation on this authority is that the proposed project may not be 'for the primary purpose of increasing local tax revenue.'

In addition, the newly-enacted statute requires the development agency and the municipal legislative body to make a finding that the public benefits outweigh any private benefits and identifies additional project goals which constitute public benefits. These new goals include: (i) increasing or sustaining market value in the municipality; and (ii) maintaining or enhancing the competitiveness of the municipality.<sup>47</sup> It is interesting to note that the legislature specifically added property tax benefits as a public benefit,<sup>48</sup> a project goal that was not previously made explicit.

Therefore, under the post-*Kelo* reform measures, increasing local tax revenues may not be the *primary* purpose of a project, but the goal of increasing tax revenues is explicitly authorized as a permitted purpose. In other words, a goal to increase local (property) taxes by a private economic development project

will satisfy the legislative requirements so long as it not the primary goal. A project will meet the new statutory test if its primary purpose, for example, is to increase or sustain market value in the municipality or to maintain or enhance the competitiveness of the municipality (both of which criteria have been added as permitted goals). The goal of increasing tax revenues is now explicitly permitted as long as it is not first on the list of project goals.

## 2. *Analysis of Legislative Reform in Municipal Economic Development.*

Does recent reform to the statutes governing municipal economic development provide any meaningful protection to Connecticut property owners? If the same plan at the heart of *Kelo* were adopted today and a challenge brought by the New London homeowners to the use of eminent domain, would their homes be protected? The validity of the plan would be based entirely on its compliance with the revised statutes.

In the wake of changes made to the governing statutes, the City need only show that increasing tax revenues is not the primary goal of the project. In the statement of project goals contained in the 2000 development plan, increased tax revenue is listed as only one of the project goals.<sup>49</sup> If creating jobs were the primary goal of the project, then it satisfies the revised statutory requirements and the use of eminent domain is authorized. If building momentum for the revitalization of downtown New London were the project's primary goal, then it satisfies the newly revised statutes and the use of eminent domain is authorized. Moreover, the stated project goal of revitalizing downtown New London falls squarely within the new statutory criterion of 'enhancing the competitiveness of the municipality.' In light of the new statutory limitation on the use of eminent domain for economic development, New London might simply omit 'increased tax revenue' from its list

of project goals if it were adopting such a plan today. But, assuming this was a project goal, placing it anywhere but first on the list would satisfy the new statutory limitation.

It is clear that the New London development plan would be authorized under the newly-revised statutes. If these statutory revisions were in effect in the year 2000, the property of Susette Kelo and the eight other homeowners in Fort Trumbull, would not be any safer from seizure by the government. The 'primary purpose' test adds no meaningful protection to Connecticut property owners. The measures adopted by the Connecticut legislature in response to *Kelo* provide no substantive protection limiting the government's authority to exercise eminent domain for the purpose of private economic development.<sup>50</sup> Indeed, it seems unlikely that anyone but the 'stupid staffer'<sup>51</sup> would fail to satisfy the statutory requirements governing a taking for private economic development in the State of Connecticut today. Connecticut property owners have no more substantive protection against government seizure of their property for private economic development today than they did in 2000.

In addition to condemnations for economic development projects, municipalities are authorized to condemn property to eradicate blight.<sup>52</sup> The New London plan in *Kelo* did not involve blighted properties and was not undertaken pursuant to the blight eradication statutory provisions. However, as part of its post-*Kelo* legislative reform, the Connecticut legislature also enacted revisions to the blight eradication statutes.

### ***B. Reform to Connecticut Blight Removal Statutes***

The statutes governing blight removal have been revised to prohibit the acquisition of property by eminent domain for a blight removal project for the primary purpose of increasing

tax revenue.<sup>53</sup> For the reasons discussed above regarding the new primary purpose test in economic development projects, this reform provides no substantive protection to property owners. By its very nature of blight removal, the project's primary goal will undoubtedly be - removal of blight. Even if increased tax revenue is a stated project goal, this would in all likelihood be reflected as a non-primary goal.

Adding the primary purpose test as a limitation on eminent domain takings under both economic development and blight removal projects provides no meaningful protection to property owners. However, the expanded definition of blight recently enacted by the Connecticut legislature has the potential to expand a city's power of eminent domain substantially.

#### ***1. Broad Blight Definition.***

The long-standing public policy of the statutes governing blight eradication in Connecticut is redevelopment of blighted areas. Municipalities are specifically authorized to use eminent domain to acquire properties within a blight redevelopment area with approval of the city's legislative body.<sup>54</sup> Properties which are unsafe, unsanitary or otherwise substandard are deemed blighted under the statute. In addition, property that is deteriorated or deteriorating is considered blighted.<sup>55</sup>

Prior to recent legislative reform, there was no statutory definition of 'deteriorated' or 'deteriorating' in the governing statutes. Now these terms are defined in revised CGS section 8-125 to include factors such as unsafe plumbing, heating and electrical facilities and unsafe streets. More importantly, under the new statute, an area is considered deteriorated or deteriorating if at least twenty percent of the buildings in the area contain defects that warrant clearance. These defects include improper location of structures, obsolete building types



and detrimental land uses.<sup>56</sup> This new statutory provision re-defining blight greatly expands the government's eminent domain power in Connecticut.

## 2. *Analysis of Legislative Reform in Blight Removal Projects.*

Connecticut cities have long had the power to use eminent domain to acquire property in blighted areas for redevelopment.<sup>57</sup> Under the new statutory definition, an area can be designated as blighted if twenty percent of the properties meet the nebulous condition of deteriorated property or the even more nebulous condition of deteriorating property. A neighborhood will be considered blighted even though *eighty percent* of the properties are well maintained. It has been suggested that, under this type of broad definition of blight, some of the country's most exclusive neighborhoods, such as Beacon Hill and Greenwich Village, could be considered blighted.<sup>58</sup>

It is not unusual for a city to sponsor private economic development under the statutory framework of blight eradication. Including such vague criteria as detrimental land use in defining blight makes it even easier for a city to use eminent domain for private commercial projects. Using a broad definition of blight, Times Square was declared blighted in the 1980's which paved the way for the City of New York to use eminent domain to acquire property for a commercial project including a new headquarters for the *New York Times*, additional office space, condominiums, and retail space.<sup>59</sup> A large portion of downtown Las Vegas was declared blighted under a broad blight definition with the result that private property was taken for the purpose of building a parking garage to be operated by, and for the benefit of, a casino consortium.<sup>60</sup>

Similarly, private property is subject to taking under the recently-expanded eminent domain authority governing blight removal in Connecticut. Property owners achieved no protection by the legislature's adoption of this expansive definition of deteriorated or deteriorating properties. In fact, this reform likely results in a further erosion of property rights in the state.

## REFORM IN OTHER STATES

Many states have enacted meaningful limitations on the use of eminent domain to protect property owners.<sup>61</sup> The Florida legislature enacted reforms which effectively abolish the use of eminent domain for private economic development.<sup>62</sup> In addition, Florida citizens passed a referendum to amend the state constitution so that enactment of any law that allows the transfer to a private party of any private property taken by eminent domain would require a three-fifths supermajority vote of the state legislature.<sup>63</sup>

Nevada has also enacted strong limitations on the use of eminent domain. Projects that transfer the property to a private person/entity are specifically excluded from permitted public uses. Limited exceptions in the legislation permit transfer to a private entity for such uses as utilities, railroads, airports or to abate an immediate threat to public safety.<sup>64</sup>

State Supreme Courts have also recently addressed the constitutionality of condemnation for private economic development interpreting their own state constitutions. Shortly after the Connecticut Supreme Court decided *Kelo*, the Michigan Supreme Court decided *Wayne v. Hathcock*.<sup>65</sup> The project in *Hathcock* provided for construction of a conference center, hotel and a recreational facility with private property to be condemned and transferred to private parties. The project

was estimated to create 30,000 jobs and \$350 million in tax revenues. The Michigan Supreme Court held that the taking violated the public use limitation contained in the Michigan State Constitution and explicitly overruled the state's landmark *Poletown* decision, effectively prohibiting the use of eminent domain for private economic development.<sup>66</sup>

The Michigan legislature subsequently endorsed *Hathcock* by adopting Joint Resolution E proposing an amendment to the Michigan State Constitution that provides: "'Public Use' does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues."<sup>67</sup> The Supreme Courts of Ohio<sup>68</sup> and Oklahoma<sup>69</sup> have also recently held that takings for private economic development are unconstitutional under their state constitutions.

In addition, many states have addressed the issue of blight removal projects in response to *Kelo* (even though *Kelo* did not deal with blight removal). For instance, under revisions adopted by the Ohio legislature, a "blighted area" is now defined as "an area in which at least seventy percent of the parcels are blighted parcels."<sup>70</sup> Florida explicitly prohibits the use of eminent domain for blight removal.<sup>71</sup> If the Connecticut legislature intended to restrict the power of eminent domain for economic development or blight projects, there are many ways this could have been accomplished.

## CONCLUSION

In the wake of *Kelo*, Connecticut enacted revisions to its statutes governing both municipal economic development and blight removal. These reform measures may at first glance appear to provide protection to property owners in the state. However, an examination of the substance of the state's reform

measures reveals that the legislature has provided no substantive limitation on the state's power of eminent domain. In fact, in the area of blight condemnation, the state's eminent domain power may well have been expanded. In the area of takings for private economic development, Connecticut legislative reform provides no meaningful protection to property owners.

## ENDNOTES

1 545 U.S. 469 (2005).

2 CONN. GEN. STAT. ANN. § 8-193 (West 2001).

3 MAGNA CARTA (1297 version, § 29) available at [http://www.archives.gov/exhibits/featured\\_documents/magna\\_carta/translation.html](http://www.archives.gov/exhibits/featured_documents/magna_carta/translation.html) ("No freeman is to be . . . disseised of his free tenement . . . save by lawful judgment of his peers, or by the law of the land.").

4 See generally JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 43, 54 (1992).

5 VanHorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (1795).

6 Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (emphasis deleted). It is interesting to note that this basic legal principle was quoted in the *Kelo* majority opinion, 545 U.S. at 478 n.5, and in Justice O'Connor's dissent. *Id.* at 494 (O'Connor, J., dissenting).

7 1 NICHOLS' THE LAW OF EMINENT DOMAIN § 1.12 (Julius L. Sackman et al. eds. rev. 3d ed. 2008).

8 U.S. CONST. amend. V.

9 Ely, *supra* note 4, at 31.

10 *Kelo v. City of New London*, 545 U.S. 469, 497 (2005) (O'Connor, J. dissenting) (internal citations omitted).

11 See *infra* note 25.

12 See generally 2A NICHOLS' THE LAW OF EMINENT DOMAIN § 7.06 (Julius L. Sackman et al. eds. rev. 3d ed. 2008).

13 In *Wayne v. Hathcock*, the Michigan Supreme Court overturned the landmark case of *Poletown Neighborhood Council v. Detroit*, citing with approval Justice Ryan's *Poletown* dissent for its well-reasoned historical analysis of three established categories of permitted transfers to private entities: (a) a transfer to a private party for

instrumentalities of commerce such as a railroad; (b) a transfer to a private party subject to public oversight following the transfer, such as for a water pipeline owned by a regulated company; and (c) a transfer to a private party based on "facts of independent public significance" such as taking property for slum clearance. *Wayne v. Hathcock*, 684 N.W.2d 765, 781-83 (Mich. 2004). *See also Kelo*, 545 U.S. at 497-98 (O'Connor, J., dissenting).

14 *Kelo*, 545 U.S. at 472. Pfizer acquired the New London Mills Site from the City of New London in 1998 and opened its research facility in 2001. *Kelo v. City of New London*, 843 A.2d 500, 508-09 (Conn. 2004).

15 The focus of *Kelo* is on these private commercial uses designated in the development plan. Note, however, that the development plan also provided for a public riverwalk through the development, a state park, and the possibility of a new U.S. Coast Guard Museum, all of which would constitute public uses under long-standing constitutional theory.

16 *Kelo*, 545 U.S. at 474-75. According to the NLDC, the development was expected to generate: (a) between 518 and 867 construction jobs; (b) between 718 and 1362 direct jobs; (c) between 500 and 940 indirect jobs; and (d) between \$680,000 and \$1,249,843 in annual property tax revenues for the City. *Kelo*, 843 A.2d at 510.

17 At the time of the trial in the Connecticut Superior Court, the NLDC was negotiating with Corcoran Jennison, a private developer, to enter into a ninety-nine year ground lease of property designated as parcels 1, 2, and 3 in the development plan for a rental fee of one dollar per year. *Id.* at 510.

18 *Id.* at 511.

19 Susette Kelo had made extensive improvements to her house. Another property owner, Wilhelmina Dery, was born in her Fort Trumbull home in 1918 and had lived there her whole life. *Kelo*, 545 U.S. at 475.

20 CONN. CONST. art. I, § 11 ("The property of no person shall be taken for public use, without just compensation therefor."). Note that the court did not separately address the state constitutional argument because the plaintiffs did not assert that the Connecticut state constitution's public use clause offered them any greater protection than that of the federal constitution. *Kelo*, 843 A.2d at 522 n.29.

21 The Fifth Amendment to the U.S. Constitution provides in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The Fifth Amendment's public use restriction has been made applicable to the states through the Fourteenth Amendment to the U.S. Constitution. *Mo. Pac. Ry. v. Nebraska*, 164 U.S. 403, 417 (1896); *Chi. Burlington & Quincy Rd. Co. v. Chicago*, 166 U.S. 226, 236 (1897).

22 *Kelo*, 843 A.2d at 528. At the Connecticut Supreme Court, *Kelo* was a 4-3 decision. Justice Zarella's dissent takes the position that private economic development projects do not constitute public use in the absence of clear and convincing evidence that the property will actually be developed to achieve a public purpose. *Id.* at 600-601 (Zarella, J., dissenting). Note also that in upholding the constitutionality of the takings in New London, the court specifically singled out the case of *Poletown Neighborhood Council v. Detroit*. *Id.* at 528 (majority opinion) (citing *Poletown*, 304 N.W.2d 455 (1981)). *Poletown* is a landmark case which upheld, under the Michigan State Constitution, the taking of private homes for the construction of a major car manufacturing assembly plant in Detroit.

Shortly after the Connecticut Supreme Court released its decision in *Kelo*, however, *Poletown* was overturned by the Michigan Supreme Court in *Wayne v. Hathcock*. 684 N.W.2d 765 (Mich. 2004). *See infra* note 66.

23 *Kelo*, 545 U.S. at 477.

24 *Id.*

25 *See id.* at 479-80 (quoting, in part, *Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984)). ("[T]his 'Court long ago rejected any literal requirement that condemned property be put into use for the general public.' Indeed, while many state courts in the mid-19th century endorsed 'use by the public' as the proper definition of public use, that narrow view steadily eroded over time. Not only was the 'use by the public' test difficult to administer (e.g., what proportion of the public need have access to the property? at what price?), but it proved to be impractical given the diverse and always evolving needs of society. Accordingly, when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as 'public purpose.'" (internal citations omitted)).

26 *See id.* at 488 (Quoting *Midkiff*, 467 U.S. at 242-43) ("When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.").

27 *Berman v. Parker*, 348 U.S. 26 (1954). In *Berman*, the Court upheld a redevelopment plan for a blighted area of Washington, D.C. Under the plan, the area would be condemned and part of it utilized for the construction of streets, schools, and other public facilities. The remainder of the land would be leased or sold to private parties for the purpose of redevelopment, including the construction of low-cost housing. The owner of a department store located in the area challenged the condemnation, arguing that his store was not itself blighted and that the creation of a "better balanced, more attractive community" was not a valid public use. The Court rejected his constitutional argument and unanimously held that the taking was a public use.

28 *See Kelo*, 545 U.S. at 480-81.

29 *Midkiff*, 467 U.S. 229 (1984) (holding that the abolition of a land oligopoly was a public benefit).

30 *Kelo*, 545 U.S. at 481-82.

31 *Id.* at 485.

32 Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Thomas dissented vigorously from the majority opinion. *See id.* at 494 (O'Connor, J., dissenting) ("To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings 'for public use' is to wash out any distinction between private and public use of property."); *see also id.* at 506 (Thomas, J., dissenting) ("If such 'economic development' takings are for a 'public use,' any taking is, and the Court has erased the Public Use Clause from our Constitution . . ."). Justice O'Connor also memorably reiterated her concern expressed at oral argument, asserting "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory." *Id.* at 503 (O'Connor, J., dissenting).

33 *Id.* at 489 ("We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. As the submissions of the parties and their amici make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate.").

34 For an extensive summary of legislative reform and other initiatives adopted by states in response to *Kelo*, see the website of the National Conference of State Legislatures at <http://www.ncsl.org>. See also <http://www.castlecoalition.org>; <http://www.ij.org>.

35 See, e.g., Press Release, Castle Coalition, Polls Remain Clear, Public Opposes Eminent Domain Abuse, (Mar. 27, 2006), available at [http://www.castlecoalition.org/index.php?option=com\\_content&task=view&id=260](http://www.castlecoalition.org/index.php?option=com_content&task=view&id=260) (last visited Nov. 13, 2008).

36 Quinnipiac University Poll, July 19-25, 2005, Quinnipiac University Polling Institute, available at <http://www.quinnipiac.edu/x1296.xml?ReleaseID=821> (last visited Nov. 13, 2008).

37 Conn. Pub. Act 07-141 (adopted June 25, 2007) and Conn. Pub. Act 07-207 (adopted July 10, 2007). The Connecticut legislature had earlier responded to the *Kelo* U.S. Supreme Court case in 2006 by creating an Office of Ombudsman for Property Rights. CONN. GEN. STAT. ANN. § 48-50 *et seq.* (West Supp. 2008). See *infra* note 50.

38 CONN. GEN. STAT. ANN. § 8-186 (West 2001). (Note, this statute has not been modified since the *Kelo* case.) ("It is found and declared that the economic welfare of the state depends upon the continued growth of industry and business within the state; . . . [the acquisition and improvement of property] often cannot be accomplished through the ordinary operations of private enterprise at competitive rates of progress and economies of cost; that permitting and assisting municipalities to acquire [property] . . . are public uses and purposes for which public moneys may be expended . . .") (The statutes governing economic development are compiled in Chapter 132 of the Connecticut General Statutes.).

39 CONN. GEN. STAT. ANN. § 8-189 (West 2001). (Included in the detailed requirements of the project plan are "a statement of the number of jobs which the development agency anticipates would be created by the project . . .," a finding that the property will be used "principally for industrial or business purposes," and a finding that "the project will contribute to the economic welfare of the municipality and the state . . .") (This statute was subsequently amended by Conn. Pub. Act 07-141 § 10 which added to the required contents of a development plan but did not delete any of the plan requirements in effect under prior law. See *infra* note 45.).

40 CONN. GEN. STAT. ANN. § 8-191(a) (West 2001). (Minor changes were made to this statute by Conn. Pub. Act 07-141 § 11.).

41 *Id.*

42 CONN. GEN. STAT. ANN. § 8-193(a) (West 2001). (This statute was subsequently amended by Conn. Pub. Act 07-141 § 1. See *infra* note 50.).

43 *Id.*

44 Conn. Pub. Act 07-141 § 1 (codified at CONN. GEN. STAT. ANN. § 8-193(b)(1) (West Supp. 2008)) ("[N]o real property may be acquired by eminent domain pursuant to this subsection for the primary purpose of increasing local tax revenue."). See also Conn. Pub. Act 07-141 § 10 (codified at CONN. GEN. STAT. ANN. § 8-189(a)(14)(D) (West Supp. 2008)).

45 Conn. Pub. Act 07-141 § 10 (codified at CONN. GEN. STAT. ANN. § 8-189(a) (West Supp. 2008)) ("The project plan shall meet an identified public need and include . . . (12) a description of the public benefits of the project including, but not limited to . . . (B) the estimated property tax benefits; . . . (G) a general description of the project's intended role in increasing or sustaining market value of land in the municipality; (H) a general description of the project's intended role in assisting residents of the municipality to improve their standard of living; and (I) a general statement of the project's role in maintaining or enhancing the competitiveness of the municipality; . . . [and] (14) a preliminary statement describing the proposed process for acquiring each parcel of real property, including findings that (A) public benefits resulting from the development plan will outweigh any private benefits; (B) existing use of the real property cannot be feasibly integrated into the overall development plan for the project; (C) acquisition by eminent domain is reasonably necessary to successfully achieve the objectives of such development plan; and (D) the development plan is not for the primary purpose of increasing local tax revenues . . .").

46 *Id.*

47 *Id.*

48 *Id.*

49 See *Kelo v. City of New London*, 545 U.S. 469, 474 (2005). (The development plan, as approved by the City of New London, reflected the goals of the project as creating jobs, generating tax revenue, and helping to build momentum for the revitalization of downtown New London.).

50 Note that other statutory changes were made to Chapter 132 (governing municipal economic development) but they do not provide any meaningful restriction on the municipality's power to exercise eminent domain. See Conn. Pub. Act 07-141 § 1 (codified at CONN. GEN. STAT. ANN. § 8-193 (West Supp. 2008)) (affording a property owner a right of first refusal to purchase his property if it will not be used for its intended purpose or some other public use; imposing a ten-year time limitation on the exercise of eminent domain after the first property in the development area is acquired; and a requirement for a public hearing to use eminent domain for an economic development project and approval by two-thirds of the legislative body). See also Conn. Pub. Act 07-141 § 8 (codified at CONN. GEN. STAT. ANN. § 8-129(a)(2) (West Supp. 2008)) (compensation payable for property taken for economic development is increased to 125% (or 150% under certain circumstances) of its appraised value.). In addition, the Connecticut Legislature in 2006 created the Office of the Ombudsman for Property Rights. The duties imposed on the Ombudsman include: providing assistance regarding eminent domain procedures to public agencies and private property owners, identifying governmental actions that have potential eminent domain implications, providing information to citizens about eminent domain law and their rights, and recommending changes that the Ombudsman



thinks should be made to the state's eminent domain law. The Office of Ombudsman for Property Rights is governed by CONN. GEN. STAT. ANN. § 48-50 *et seq.* (West Supp. 2008).

51 See generally *Kelo*, 545 U.S. at 502 (O'Connor, J., dissenting) (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025-26 n.12 (1992)) ("[I]t is difficult to envision anyone but the 'stupid staff[er]' failing it.").

52 CONN. GEN. STAT. ANN. § 8-124 *et seq.* (West Supp. 2008). (The statutes governing blight eradication are compiled in Chapter 130 of the Connecticut General Statutes.).

53 Conn. Pub. Act 07-141 § 2 (codified at CONN. GEN. STAT. ANN. § 8-127a (West Supp. 2008)). ("No real property may be acquired by a redevelopment agency by eminent domain pursuant to section 8-128 under a redevelopment plan under this chapter for the primary purpose of increasing local tax revenue.") Note that other statutory changes were made to the statutes governing blight removal but they do not provide any meaningful restriction on a municipality's power to exercise eminent domain. There is now a requirement that the public benefits outweigh any private benefits from the project; the current use of the property cannot be feasibly integrated into the project plan; and the taking is reasonably necessary to achieve the plan's objectives. *Id.* Other reforms include: imposing a ten year time limitation on the exercise of eminent domain after the first property is acquired under the plan; and affording a property owner a right of first refusal to purchase his property if it will not be used for its intended purpose or some other public use. *Id.* In addition, compensation payable is increased to 125% of appraised value under certain circumstances. Conn. Pub. Act 07-141 § 8 (codified at CONN. GEN. STAT. ANN. § 8-129(a)(2) (West Supp. 2008)).

54 CONN. GEN. STAT. ANN. § 8-128(a) (West Supp. 2008). This section is unchanged by recent reform but has been re-numbered.

55 CONN. GEN. STAT. ANN. § 8-125(2) (West Supp. 2008). For purposes of the blight removal statutes, a redevelopment area means one that is "deteriorated, deteriorating, substandard or detrimental to the safety, health, morals or welfare of the community . . . and may include structures not in themselves substandard or insanitary which are found to be essential to complete an adequate unit of development, if the redevelopment area is deteriorated, deteriorating, substandard or detrimental to the safety, health, morals or welfare of the community." This section is unchanged by recent reform but has been re-numbered.

56 Conn. Pub. Act 07-207 § 1 (codified at CONN. GEN. STAT. ANN. § 8-125(7) (West Supp. 2008)) ("Deteriorated" or "deteriorating" with respect to a redevelopment area means an area within which at least twenty per cent of the buildings contain one or more building deficiencies or environmental deficiencies, including, but not limited to: (A) Defects that warrant clearance; (B) conditions from a defect that are not correctable by normal maintenance; (C) extensive minor defects that collectively have a negative effect on the surrounding area; (D) inadequate original construction or subsequent alterations; (E) inadequate or unsafe plumbing, heating or electrical facilities; (F) overcrowding or improper location of structures on land; (G) excessive density of dwelling units; (H) conversion of incompatible types of uses, such as conversion of a structure located near family dwelling units to rooming houses; (I) obsolete building types, such as large residences or other buildings which because of lack of use or maintenance have a blighting influence; (J) detrimental land uses or conditions, such as incompatible uses, structures in mixed use, or adverse influences from noise, smoke or fumes; (K) unsafe, congested, poorly designed, or otherwise

deficient streets; (L) inadequate public utilities or community facilities that contribute to unsatisfactory living conditions or economic decline; or (M) other equally significant building deficiencies or environmental deficiencies.").

57 CONN. GEN. STAT. ANN. § 8-128 (West 2001).

58 *Norwood v. Horney*, 853 N.E.2d 1115, 1144 n.13, 1145-46 (Ohio 2006). The *Norwood* Court overturned the taking of homeowners' property based on a local ordinance defining blight to include a "deteriorating" area. The Court held the term deteriorating area to be unconstitutionally void for vagueness and offending due process rights: "In essence, 'deteriorating area' is a standardless standard." *Id.* at 1145-46. See also *infra* note 68.

59 *In re W. 41st St. Realty v. N.Y. State Urban Dev. Corp.*, 744 N.Y.S.2d 121 (N.Y. App. Div. 2002).

60 *City of Las Vegas Downtown Redev. Agency v. Pappas*, 76 P.3d 1 (Nev. 2003).

61 See *supra* note 34.

62 FLA. STAT. § 73.013 (enacted by HB 1567 effective May 11, 2006) (providing in part: "(1) Notwithstanding any other provision of law . . . ownership or control of property acquired pursuant to [an eminent domain] petition may not be conveyed by the condemning authority or any other entity to a natural person or private entity, by lease or otherwise, except that ownership or control of property acquired pursuant to such petition may be conveyed, by lease or otherwise, to a natural person or private entity [for common carrier services, public transportation, public infrastructure].").

63 Florida legislative referendum passed by 69% vote in 2006. See Nat'l Conference of State Legislatures, <http://www.ncsl.org/ncsl/db/elect98/irsch.cfm?recid=2775> (last visited Nov. 13, 2008).

64 Nevada Assembly Bill No. 102, § 4 amending NEV. REV. STAT. § 37.010 (adopted May 23, 2007) (This bill provides in part: "Notwithstanding any other provision of law and except as otherwise provided in this subsection, the public uses for which private property may be taken by the exercise of eminent domain do not include the direct or indirect transfer of any interest in the property to another person or entity. . . ." Transfers to a private party are permitted in limited circumstances including use for a utility, railroad, airport and the like, and a taking required to abate an immediate threat to the safety of the public or remediate hazardous waste. The Nevada Legislature also adopted in Assembly Joint Resolution 3 a proposed amendment to the Nevada Constitution incorporating the provisions of Assembly Bill No. 102.).

65 *Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

66 *Id.* at 787 (explicitly overruling *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981)). In *Poletown*, the Michigan court held constitutional the condemnation of private residential properties for transfer to a private corporation for the construction of a General Motors assembly plant in Detroit which was intended to add jobs and taxes to both the city and state.

67 Joint Resolution E adopted by Michigan Legislature on December 13, 2005.

68 *Norwood v. Horney*, 853 N.E. 2d 1115 (Ohio 2006). In addition to holding the definition of deteriorated and deteriorating areas to be void for vagueness, *Norwood* held that providing an economic benefit to the City, standing alone, does not satisfy the public use requirement of the Ohio State Constitution. In *Norwood*, the City condemned property in an area that it determined to be "deteriorating" to transfer it to a private developer for construction of apartments, condominiums, office space, retail space, and City-owned parking garages. The City estimated the project would result in nearly \$2 million in annual revenues for it. The *Norwood* court cited with approval the analysis of *Hathcock*, the dissenting opinions of the Supreme Court Justices in *Kelo*, and the dissenting opinions of the Connecticut justices in *Kelo*. *Id.* at 1140-41. See *supra* note 58.

69 *Muskogee County v. Lowery*, 136 P.3d 639 (Okla. 2006); see also *id.* at 650-51 ("[W]e hold that economic development alone does not constitute a public purpose and therefore does not constitutionally justify the County's exercise of eminent domain . . . . [W]e view the transfer of property from one private party to another in furtherance of potential economic development or enhancement of a community in the absence of blight as a purpose, which must yield to our greater constitutional obligation to protect and preserve the individual fundamental interest of private property ownership.").

70 OHIO REV. CODE ANN. § 1.08(A)(2007). Contrast this with Connecticut's definition of blight as an area within which at least twenty percent of the buildings are deficient. CONN. GEN. STAT. ANN. § 8-125(7) (West Supp. 2008) (adopted by Conn. Pub. Act 07-207 § 1).

71 FLA. STAT. § 73.014(2) (enacted by HB 1567 effective May 11, 2006) (providing in part: "Notwithstanding any other provision of law . . . the state . . . may not exercise the power of eminent domain for the purpose of preventing or eliminating slum or blight conditions . . .").

## KNUDSEN v. LAX: RESCISSION OF A LEASE AGREEMENT WHEN A SEX OFFENDER MOVES NEXT DOOR

by  
Sharlene A. McEvoy\*

### ABSTRACT

When a registered sex offender moves next door, does a tenant have a right to terminate a lease for violation of the covenant of quiet enjoyment?

### INTRODUCTION

Sometimes a Small Claims Court case can lead to a decision with important implications for landlords and tenants among others. *Knudsen v. Lax*<sup>1</sup> which dealt with the issue of whether or not a family with three young daughters could terminate its lease for an apartment when a Level Three sex offender moved next door.

The case presented a novel question for the New York County Court and for the lease agreement itself.

While those who rent apartments are often confronted with disruptive or disagreeable neighbors, such a situation is not enough to permit a tenant to terminate the lease.<sup>2</sup>

But when a sex offender moves next door, the notion of the implied covenant of quiet enjoyment takes on a whole new meaning.

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